IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAVID DANON	:	
	:	
v.	:	CIVIL ACTION NO. 15-CV-6864
	:	
THE VANGUARD GROUP, INC.	:	HONORABLE C. DARNELL JONES, II
	:	

STIPULATION AND ORDER

WHEREAS:

A. The parties stipulate to a stay of these proceedings, as explained in detail below.

B. On December 31, 2015, Plaintiff filed a Complaint in this action, asserting claims under the Dodd-Frank Act ("DFA"), the Sarbanes Oxley Act ("SOX"), and the Pennsylvania Whistleblower Law ("PWL").

C. On March 7, 2016, Defendant moved to dismiss all claims contained in the complaint.

D. By Judgment entered May 23, 2016 ("May 23 Judgment"), this Court granted Defendant's motion to dismiss for failure to state a claim and dismissed with prejudice all claims.

E. The Court based its dismissal of all three claims on the doctrine of collateral estoppel, but also dismissed the SOX claim for failure to exhaust administrative remedies and the PWL claim because it was time-barred.

F. By Opinion and Judgment entered on April 12, 2017, the United States Court of Appeals for the Third Circuit held that collateral estoppel did not bar Plaintiff's claims.

G. However, the Court of Appeals vacated only that portion of the May 23 Judgment that dismissed the DFA claim. The Court of Appeals concluded that this Court provided sufficient alternative grounds for dismissing the SOX and PWL claims.

H. The Court of Appeals remanded for further proceedings consistent with its Opinion.

I. The Court of Appeals' Opinion noted that "[t]he parties raised additional arguments regarding the [DFA] claim before [the Court of Appeals]" [but] The District Court . . . is better situated to rule on these claims in the first instance. Thus, we will not resolve them here."

J. One of the additional arguments that Defendant raised in favor of dismissing the DFA claim is that the anti-retaliation provisions of the DFA only protects individuals who report to the SEC, but does not protect individuals who report internally without also reporting to the SEC ("Internal Reporting Issue"). Plaintiff reported alleged concerns to the SEC only after learning his employment would be terminated.

K. The Court of Appeals issued its Mandate on May 4, 2017; this Court now has jurisdiction over this matter.

L. Defendant wishes to renew its motion to dismiss (which Plaintiff intends to oppose) regarding the DFA claim so that this Court may address Defendant's arguments.

M. Before Defendant renews its motion, however, Plaintiff wishes to amend his Complaint to, among other things, address certain issues raised in the Court of Appeals' Opinion.

N. Thereafter, both parties wish to provide further briefing regarding Defendant's motion to dismiss. The briefing is necessary both to update the court on recent developments in the law, particularly the Internal Reporting Issue, and to provide more focused arguments on whatever issues remain.

O. Before Plaintiff amends his complaint or Defendant renews the motion to dismiss, the parties jointly request a stay of all proceedings pending the United States Supreme Court's resolution of Digital Realty Inc.'s petition for a writ of certiorari (filed on April

25, 2017) in the case of *Somers v. Digital Realty, Inc.*, 850 F.3d 1045 (9th Cir. 2017). In *Somers*, the Ninth Circuit directly addressed the Internal Reporting Issue and held that internal reporting is sufficient. *See Somers*, 850 F.3d at 1050.

P. There is a very good chance that the Supreme Court will grant the petition for a writ of certiorari in *Somers* and decide the Internal Reporting Issue. The Supreme Court often grants certiorari where there is disagreement among the circuit courts on an important question of federal law. *See, e.g.*, Sup. Ct. R. 10; *Thompson v. Keohane*, 516 U.S. 99, 106 (1995) (granting certiorari "[b]ecause uniformity among federal courts is important" on recurring, significant issues). Those factors are present here.

Q. First, a conflict amongst the circuits exists regarding the Internal Reporting Issue, which can be resolved if the Supreme Court grants the petition for a writ of certiorari in *Somers*. As noted by Digital Realty in its petition, the Second Circuit reached the same conclusion as the Ninth Circuit reached in *Somers*. *See Berman v. Neo@Ogilvy LLC*, 801 F.3d 145, 155 (2d Cir. 2015). The Fifth Circuit, on the other hand, reached the opposite conclusion: i.e., that reporting to the SEC is required. *Asadi v. G.E. Energy*, 720 F.3d 620, 630 (5th Cir. 2013).

R. Second, the Internal Reporting Issue is an important and recurring question of federal law. Employees frequently report perceived problems internally and/or to the SEC. *See* Navex Global, *2016 Ethics & Compliance Hotline Benchmark Report* 7 (2016) (noting that employers received roughly 1.3 reports of misconduct for every 100 employees);[1] SEC, *2016 Annual Report to Congress on the Dodd-Frank Whistleblower Program* 1

1 This report is available at https://tinyurl.com/l4aby88.

(Nov. 2016).[2] As a result, numerous district courts have grappled with this issue, with conflicting results.[3]

S. This Court's authority to stay proceedings "is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time for itself, counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). To that end, "in the exercise of its sound discretion, a court may hold one lawsuit in abeyance to abide the outcome of another which may substantially affect it or be dispositive of the issues." *Airgas, Inc. v. Cravath, Swaine & Moore LLP*, No. CIV. A. 10-612, 2010 WL 624955, at *2 (E.D. Pa. Feb. 22, 2010) (citing *Bechtel Corp. v. Local 215, Laborers' Int'l. Union of N. Am., AFL-CIO*, 544 F.2d 1207, 1216 (3d Cir. 1976)). In deciding whether to grant a motion to stay, courts consider "whether the proposed stay would prejudice the nonmoving party, whether the proponent of the stay would suffer a hardship or inequity if forced to proceed and whether granting the stay would further the interest of judicial economy." *Airgas*, 2010 WL 624955 at *3.

T. Holding this matter in abeyance until the Supreme Court decides *Somers* promotes

2 This report is available at https://www.sec.gov/files/owb-annual-report-2016.pdf.

3 *Compare, e.g.*, *Dekyes v. Cooper-Standard Auto., Inc.*, Civ. No. 16-11828, 2016 WL 6873395, at *2–4 (E.D. Mich. Nov. 22, 2016) (agreeing with the Fifth Circuit); *Lamb v. Rockwell Automation Inc.*, Civ. No. 15-1415, 2016 WL 4273210, at *4 (E.D. Wis. Aug. 12, 2016) (same); *Puffenbarger v. Engility Corp.*, 151 F. Supp. 3d 651, 663–65 (E.D. Va. 2015) (same); *Verble v. Morgan Stanley Smith Barney, LLC*, 148 F. Supp. 3d 644, 656 (E.D. Tenn. 2015) (same), *aff'd on other grounds*, No. 15-6397, 2017 WL 129040 (6th Cir. Jan. 13, 2017), *cert. denied*, No. 16-946, 2017 WL 434012 (U.S. Mar. 20, 2017); *Duke v. Prestige Cruises Int'l, Inc.*, Civ. No. 14-23017, 2015 WL 4886088, at *3 (S.D. Fla. Aug. 14, 2015) (same); *Verfuerth v. Orion Energy Sys., Inc.*, 65 F. Supp. 3d 640, 643-646 (E.D. Wis. 2014) (same); *Englehart v. Career Educ. Corp.*, Civ. No. 14-444, 2014 WL 2619501, at *9 (M.D. Fla. May 12, 2014) (same); *Wagner v. Bank of Am. Corp.*, Civ. No. 12-381, 2013 WL 3786643, at *6 (D. Colo. July 19, 2013) (same), *aff'd on other grounds*, 571 Fed. App'x 698 (10th Cir. 2014), *with, e.g.*, *Lutzeier v. Citigroup Inc.*, Civ. No. 14-183, 2015 WL 7306443, at *2 (E.D. Mo. Nov. 19, 2015) (reaching the Second and Ninth Circuits' result); *Dressler v. Lime Energy*, Civ. No. 14-7060, 2015 WL 4773326, at *16 (D.N.J. Aug. 13, 2015) (same); *Bussing v. COR Clearing, LLC*, 20 F. Supp. 3d 719, 733 (D. Neb. 2014) (same); *Khazin v. TD Ameritrade Holding Corp.*, Civ. No. 13-4149, 2014 WL 940703, at *6 (D.N.J. Mar. 11, 2014) (same), *aff'd on other grounds*, 773 F.3d 488 (3d Cir. 2014); *Ellington v. Giacoumakis*, 977 F. Supp. 2d 42, 45 (D. Mass. 2013) (same); *Genberg v. Porter*, 935 F. Supp. 2d 1094, 1107 (D. Colo. 2013) (same), *aff'd in part on other grounds and dismissed in part*, 566 Fed. Appx. 719 (10th Cir. 2014); *Nollner v. S. Baptist Convention, Inc.*, 852 F. Supp. 2d 986, 994-995 (M.D. Tenn. 2012) (same).

judicial economy. A stay spares the parties and the Court from unnecessarily expending time and resources on a dispositive issue that is likely to be decided by the Supreme Court. Indeed, courts regularly issue stays where Supreme Court review would resolve central issues of the dispute. *See, e.g.*, *Coombs v. DiGuglielmo*, No. Civ. A. 04-1841, 2004 WL 1631416, at *1 (E.D. Pa. July 21, 2004) ("the resources of the judiciary and litigants will be conserved by staying this case pending the Supreme Court's decision" on an issue that may have "a significant impact on the case before the court"); *Koslow v. Pennsylvania*, 158 F. Supp. 2d 539, 541 (E.D. Pa. 2001) (proceedings stayed pending a U.S. Supreme Court decision relevant to plaintiff's claim); *Gillyard v. Stylios*, No. Civ. A. 97-6555, 1998 WL 966010, at *1 (E.D. Pa. Dec. 23, 1998) (same); *see also Kohn v. UnumProvident*, No. Civ. A. 2:04-cv-4929, 2008 WL 4787556, at *4 (E.D. Pa. Oct 31, 2008) (proceeding stayed pending a Pennsylvania Supreme Court decision that would affect plaintiff's claim); *Freudberg v. Household Int'l, Inc.*, No. Civ. A. 051779, 2006 WL 328406, at *1 (E.D. Pa. Feb. 8, 2006) (same).[4]

IT IS HEREBY STIPULATED AND AGREED, by the parties, as follows:

1. This case should be stayed pending a decision by the United States Supreme Court as to whether or not to grant the *Somers* petition for writ of certiorari and, if granted, a decision on the merits by the United States Supreme Court.

2. Plaintiff may amend his complaint within 21 days from a denial of the *Somers*

[4] Moreover, courts often grant stays pending Supreme Court resolution where petitions for certiorari are still pending. *See, e.g.*, *Coombs*, 2004 WL 1631416 at *1 (stay granted pending petition for certiorari in another case); *W. Penn Allegheny Health Sys., Inc. v. UPMC*, No. 09CV0480, 2011 WL 334477, at *1 (W.D. Pa. Jan. 31, 2011) (stay granted pending petitions for certiorari filed by defendants); *Rodriquez v. Cleansource, Inc.*, No. 14-CV-0789-L(DHB), 2015 WL 12434307, at *3 (S.D. Cal. Feb. 26, 2015) (stay granted while petitions for certiorari were pending in two other cases, finding that "moving forward would require the Court to waste time on issues that may be fully adjudicated by the Supreme Court"); *California Ass'n of Health Facilities v. Maxwell-Jolly*, No. CV 10-3259 CASMANX, 2010 WL 2612694, at *2 (C.D. Cal. June 24, 2010) (stay granted pending resolution of petitions for certiorari in two other cases).

petition for writ of certiorari or a decision on the merits by the Supreme Court if such decision is not dispositive of Plaintiff's claims.

3. Defendant may have 28 days after Plaintiff amends his complaint, or the deadline to amend expires, to file a motion to dismiss.
4. Plaintiff may have 28 days after Defendant files its motion to dismiss to respond.
5. The parties may request leave to file reply and sur-reply briefs, in accordance with the Court's procedures.

/s/ James L. Griffith, Esq.
James L. Griffith, Esq.
Attorney I.D. No. 05023
JAMES L. GRIFFITH, ESQ. LLC
920 Lenmar Drive
Blue Bell, PA 19422
(484) 868-9700
jgriffith@jlgriffithlaw.com

Attorney for Plaintiff

/s/ Paul G. Nofer
Paul G. Nofer
Attorney I.D. No. 52241
KLEHR HARRISON HARVEY BRANZBURG LLP
1835 Market Street, Suite 1400
Philadelphia, PA 19103
(215) 569-3287
pnofer@klehr.com

Kelly A. Carrero
(*pro hac vice* to be submitted)
JONES DAY
250 Vesey Street
New York, NY 10281
(212) 326-3939

Attorneys for Defendant

Dated: May 9, 2017

SO ORDERED:

C. Darnell Jones [signature]
C. Darnell Jones, II, J.

Dated: May 10, 2017